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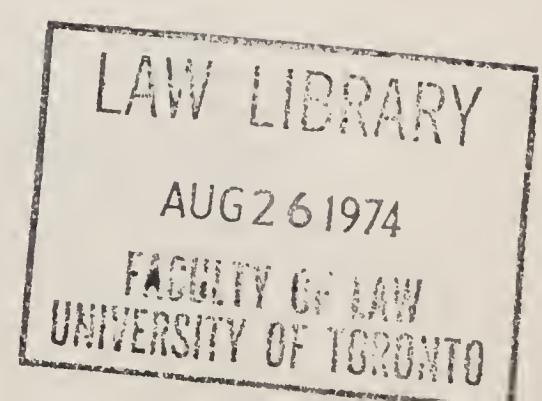
Cases and Notes

edited by

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PROFESSOR  
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UNIVERSITY OF TORONTO

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## PREFACE

These cases and notes are a product of my interest in the law of restitution dating back to 1961 when I attended the seminar in the subject offered by Robert Goff, Q.C. and Professor Aubrey Diamond at the London School of Economics and Political Science. In the intervening period Mr. Goff, with Gareth Jones of Cambridge University has published an excellent text, I have taught my own seminar at the Faculty of Law, University of Toronto and restitution has slowly risen to the status of a recognized "Subject" in the curricula of a few Canadian law schools. More conspicuously, it has also risen to trouble more than a few judicial heads with its unfamiliar terminology and dangerously vague-sounding 'principles'. I think that the reason for the delayed acceptance of restitution as an integrated part of Canadian law (the American Law Institute's Restatement of the subject was, after all, published in 1936 -- the year of my birth) is partly to be found in its rather peculiar, tortured history, but its continuing unfamiliarity among teachers, counsel and courts, even after most of the historical difficulties have been swept aside must be related least in part to the fact that even in current editions of our standard legal search and reference works one may look in vain for the topic eo nomine. In order to assemble even the present collection it has been necessary for me to scour virtually half of the volumes of the Canadian Abridgement -- and I greatly regret not having had the time to scour the others. It was partially in the hopes of producing a useful teaching aid for my own students at the University of Toronto Faculty of Law and for the new courses springing up in other law schools but also in the hopes of providing the other branches of the legal profession with a convenient source of Canadian references that I undertook the publication of my still-incomplete notes and syllabus at this time. It is my further hope that with the fresh attention which may be thus brought to the available Canadian precedents we may complete the task of fashioning a mature law of restitution for Canada, and arrest (if not end completely) the distressingly common tendency at present for counsel and courts when faced with a problem of restitution, to throw up the names of 3 or 4 leading cases having nothing to do with the particular problem at hand (usually Moses v. Macferlan, Brooks, Wharf, Fibrosa and Degiman) and end with a plea for "equity" and fair dealing.

In the editing and arrangement of the material I have attempted to balance and to serve the common needs of student, teacher and practitioner. The chapters and sections follow the general outline of Goff and Jones, The Law of Restitution (1965) which (as I have said elsewhere) has many advantages in providing an easy entree for those untrained in or unfamiliar with the basic theoretical structure of the subject. Even so, it has been necessary to make slight changes in the interest of

more effective teaching. To the same end the cases reproduced in full were chosen for their capacity to stimulate argument as much as for their venerability or stature as precedents. This has meant relegating more than a few loci classici and many more recent cases to the interstacial notes, where (hopefully) their force may still be felt and their contribution noted by those whose needs at the moment run more to ideas, authority and precedent than intellectual stimulation. Similarly, and as well to the end of making the students' task of reading more easy, I have retained (or composed) brief headnotes or catchlines and abbreviated the citations of precedents in the principal cases (but not in the notes) to their year and (where necessary to clarify) jurisdiction. As a result, it ought to be possible for readers to discover at a glance, the thrust of any particular case, and the general drift of whole sections. At the same time, not so much of the reasoning of the case is disclosed that such students as might be inclined to rely solely on the catchlines cannot be readily exposed in class. Those requiring a full citation for a case referred to in edited form may find it in the Table of Cases. At 432 pages, the book is designed for use in a 45-hour course, the students being expected to prepare about 12 pages of reading for each classroom hour. Courses of 30 - 36 hours may be fashioned in various ways, in the discretion of the instructor.

I am grateful to Dean R. St. J. Macdonald and the University of Toronto for their financial assistance in producing the present volume; to Misses Linda Ramsay, Vera Russell and Lorraine Woytowich for typing the manuscript; to my wonderful wife, Diana, for some typing, some proof reading, preparing the Table of Cases, and generally pitching in where needed, and, finally, to my students for their sustaining interest, vigorous criticism and the challenge of their continually fresh approach.

78 Queens Park Cres.  
Toronto  
30 August, 1969

B.C.

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## CHAPTER I

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Section 1

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The object of this introductory Section is to present very briefly an over-all view of the history of the development of the common law remedies which are now subsumed under the rubric of Restitution. This whole area of the law has suffered inordinately from fluctuating vogues in judicial approach over the years, with the result that it is very nearly impossible to state any rule without fear of contradiction from some Judge speaking from another, different era. At one time or another it has been thought to be (a) impossible to give restitution at all; (b) impossible unless within the limits of some implied contract; (c) possible if "just and reasonable" to do so; (d) possible if in accordance with the principles of unjust enrichment. It is necessary to have some understanding of the theoretical bases for, and the scope of these various swings in opinion if one is to be able to place judicial pronouncements from even the recent past in their historical and analytical context - whether that be for the purpose of distinguishing them out of all countenance, or propping them up as "pillars of ancient wisdom".

Of course this debate on the theoretical basis and the necessary conditions for the application of restitutionary remedies did not take place in a vacuum. The pressures of cases requiring decision necessitated the continued use of these remedies by the Courts even if no agreement existed as to their essential nature or their position in the analytical framework of the law. Accordingly, this Chapter, in both its principal Sections, will also provide you with a glimpse of the major restitutionary remedies at work. You should consider as you proceed, whether some of these cases do not require "explaining" in the light of refinements later developed in the remedies actually administered under each descriptive name - e.g. have we maintained a uniform notion of the scope of "money had and received" or "constructive trust"?

